Montauk Bus Company *and* United Industry Workers Local 424, a Division of United Industry Workers District Council 424. Cases 29–CA–19466 and 29–CA–19518

November 7, 1997

DECISION AND ORDER

BY CHAIRMAN GOULD AND MEMBERS FOX AND HIGGINS

On January 24, 1997, Administrative Law Judge Raymond P. Green issued the attached decision. The Respondent filed exceptions and a supporting brief. The General Counsel filed a brief in support of the judge's decision.

The National Labor Relations Board has considered the decision and the record in light of the exceptions and briefs and has decided to affirm the judge's rulings, findings,[1] and conclusions[2] and to adopt the recommended Order.

ORDER

The National Labor Relations Board adopts the recommended Order of the administrative law judge and orders that the Respondent, Montauk Bus Company, Holbrook, New York, its officers, agents, successors, and assigns, shall take the action set forth in the Order.

[1] The Respondent has excepted to some of the judge's credibility findings. The Board's established policy is not to overrule an administrative law judge's credibility resolutions unless the clear preponderance of all the relevant evidence convinces us that they are incorrect. *Standard Dry Wall Products*, 91 NLRB 544 (1950), enfd. 188 F.2d 362 (3d Cir. 1951). We have carefully examined the record and find no basis for reversing the findings.

In adopting the judge's finding that the Respondent has not met its burden of showing that the striker replacements it hired were permanent, we do not rely on his statement that John Mensch Jr., who interviewed applicants, was unable to specify the particular employees to whom he promised permanent status.

Member Higgins notes that the Respondent has excepted to the judge's rejection of its contention that personal attacks on it by Kevin E. Boyle, the Union's general executive vice president, should disqualify Boyle from acting as the bargaining representative. Because the Respondent did not explicate this exception and did not argue this point in its supporting brief, he would find that its exception may be disregarded. *Show Industries*, 312 NLRB 447 fn. 2 (1993).

[2] We find it unnecessary to decide whether the Respondent's refusal to reinstate striking employees, upon their unconditional offer to return to work, violated Sec. 8(a)(3) of the Act rather than only Sec. 8(a)(1). An 8(a)(3) finding would not add materially to the remedy.

Saundra Ratner Esq., for the General Counsel.
Neil M. Frank Esq. and *Christopher T. Borruso Esq.*, for the Respondent.
Stuart A. Weinberger Esq. and *Julie P. Schatz Esq*, for the Union.

DECISION

STATEMENT OF THE CASE

RAYMOND P. GREEN, Administrative Law Judge. This case was tried in Brooklyn, New York, on September 30, October 1 and 2, 1996. The charges were filed on September 7 and 28, 1995. The consolidated complaint was issued on March 29, 1996, and alleged as follows:

1. That on July 1, 1995, the Respondent was awarded a contract to provide schoolbus services for the Sachem School District in Suffolk County, New York, and that since then the Respondent has continued to operate in the same manner as the former company; namely Laidlaw Transit Inc.

2. That on taking over the operations from Laidlaw, the Respondent has employed as a majority of its employees, persons who were previously employed by Laidlaw.

3. That the following unit is appropriate for purposes of collective bargaining within the meaning of Section 9(b) of the Act.

> All school bus drivers employed by the Employer, performing services in the Sachem School District and excluding all dispatchers, mechanics, office clerical employees, guards and supervisors as defined in the Act.

4. That the Respondent has refused to recognize and bargain with the Union.

5. That from about September 11 until September 18, 1995, certain of the Respondent's employees engaged in an economic strike and established a picket line at the Employer's bus depot located at 177 Morris Avenue, Holbrook, New York.

6. That on September 18, 1995, the Union on behalf of the striking employees, offered unconditionally to return to work.

7. That since September 18, 1995, the Respondent has failed and refused to reinstate or offer to reinstate the striking employees.

The Respondent makes a number of arguments which can be summarized as follows:

1. It is not a successor to Laidlaw and does not have an obligation to bargain with the Union. Among other things, the Company argues that there is no continuity of employment and that the unit no longer would be appropriate.

2. That even if it was a successor, the Union is disqualified from representing the employees because of its conduct which among other things, disparaged the Company's product and constituted an impermissible conflict of interest.

3. That the strikers are not entitled to reinstatement because (a) they were permanently replaced and (b) they were engaged in unprotected activity.

FINDINGS OF FACT

I. JURISDICTION

The Respondent is engaged in the business of providing schoolbus services to public and private schools. It concedes and I find that it is an employer engaged in commerce within the meaning of Section 2(2), (6), and (7) of the Act. The parties also agree and I find that the Union is a labor organization within the meaning of Section 2(5) of the Act.

II. ALLEGED UNFAIR LABOR PRACTICES

A. *The History of the Bargaining Unit*

The Sachem School District is located in Long Island, New York, and is bordered by the towns of Bohemia, Ronkokoma, Lake Grove, and Holbrook, New York. It is the largest School District in Long Island, comprising about 25-square miles and includes 16 to 17 schools. The District, employs some of its own bus drivers, but the bulk of the transport has been contracted out to private companies. The District has about 80 bus routes which requires about 88 to 89 busdrivers.

On May 23, 1989, the Regional Office of the Board, after an election, issued a certification to the Union in relation to certain employees of Suburbia Bus Corp. The unit set forth in the certification was:

> All school bus drivers, working out of the Employer's Bohemia yard and performing services in the Sachem School District, excluding all dispatchers, mechanics, office clerical employees, guards and supervisors as defined in the Act.

From 1989 to 1992, the School District contracted the work to Suburbia Bus Corp., and this company had a series of collective-bargaining agreements with the Union covering the drivers. In 1992, the School District awarded the bus contract to another company called Laidlaw Transit Inc., and after hiring Suburbia's drivers, Laidlaw entered into a collective-bargaining agreement with the Union. The unit description in Laidlaw's contract was essentially the same as the one described in the above noted certification and the previous contract between Suburbia and the Union. The recognition clause in the collective-bargaining agreement read:

> The employer recognizes the Union pursuant to NLRB Certification 29–RC–7179 as exclusive representative of all its schoolbus drivers working out of its Bohemia yard and performing services in the Sachem School District for the purpose of collective bargaining. . . . Should the Employer obtain additional work at the Bohemia location during the term of this Agreement, all such employees, except those excluded in this paragraph shall be included in the bargaining unit.[1]

It should be noted that Laidlaw is a Delaware corporation which is engaged in providing schoolbus services throughout the United States and having its principle offices in Canada. See *Laidlaw Transit*, 318 NLRB 695 (1995). At the time of the events herein, Laidlaw, according to Tom McEnany, its division manager for Long Island, had three separate labor contracts with Local 424 covering five of its terminals in Long Island. One covered the Bohemia location that became null and void when Laidlaw lost the Sachem School District contract. Another covered three terminals servicing eight School Districts. And a third contract covered a single terminal which Laidlaw obtained by purchasing a company that had a contract with Local 424. (It is unknown to me how many School Districts were serviced by the third contract.)

[1] We noted that the unit set forth in the certification and the unit set forth in the recognition clause of the contracts are different from the unit alleged to be appropriate in the consolidated complaint. More about this later.

B. *The School District puts the Contract out for Bid*

In 1995, the Sachem School District decided to open the contract for new bids. This resulted in the awarding of the contract for home to school routes, for the school year, September 1995 to June 1996, to Montauk. Nevertheless, Laidlaw retained, for that year only, the work of providing buses and drivers for after school events. (Typically, sporting events, etc.) For the following year, 1996 to 1997, Montauk was awarded all of the work including the after schoolwork.

Prior to the bus contract being awarded, the Union began to take steps in an attempt to insure that any new contractor would hire the employees, recognize the Union and assume the collective-bargaining agreement.

On February 6, 1995, the Union by Kevin E. Boyle, its general executive vice president, sent a letter to John M. Mensch Sr., president of Montauk (with copies to the School Board), which stated in pertinent part:

> As a result of your attendance at a bidders conference on February 3, 1995, concerning the transportation contract for the Sachem Central School District, it appears that you may submit a bid on February 10, 1995.
>
> In furtherance of my statements at the bidders meeting, United Industry Workers Local 424, represents the drivers providing service to the district. They have an average of 12-1/2 years of service in the district, and over 90% the drivers are district residents and taxpayers.
>
> In order that you have the proper labor data and so that no bidder is prejudiced by not having a copy of the Collective Bargaining Agreement, I have enclosed same.
>
> Should your company be the low responsible bidder, we will provide you the names, addresses, phone numbers and other pertinent data for each driver in order that you may contact them for what I would guess would be the scheduling of an introduction meeting for your new employees.
>
> We look forward to a smooth transition and school opening in September should your company be awarded the bid.

On March 15, 1995, Boyle wrote another letter to Mensch Sr. which enclosed a collective-bargaining agreement which the company was asked to sign in the event Montauk won the contract. In pertinent part this letter stated:

> In Wednesday's Western Edition of Suffolk Life, you placed an ad which was a report of an apparent letter you sent to Thomas Dodson, President of the Sachem Central School District Board of Education. Contained therein . . . you state that if Montauk Bus were to be awarded the Sachem transportation contract, it would maintain employee (driver) wages and benefits. Additionally, you appropriately acknowledged the tremendous performance of the drivers who provide service in the district.

> Since the district has yet to award the transportation contract and your company could potentially be awarded same, I have prepared for your signature a successor agreement which will allow you to sign an agreement that mirrors your words.
>
> If your letter was not merely a political statement, you should have no problem signing the enclosed. A copy of the collective bargaining agreement referred in the successor agreement is enclosed.

On the same date, Boyle also wrote a letter to the School District asserting his belief that Montauk intended to eliminate the current drivers and reduce wages and benefits. He ended his letter by stating, ''We urge you to adopt Laidlaw's bid so that uninterrupted, professional service to the district can be maintained.''

Soon thereafter, the Sachem School District awarded the home to school portion of the schoolbus service to Montauk, while awarding the after schoolwork to Laidlaw. The home to school portion of the work comprised about 90 percent of the contracted out schoolbus driving in the District. This consisted of 79 routes.

On March 22, 1995, Boyle sent another letter to Mensch. In pertinent part, this read:

> We would like to take this opportunity to congratulate you on being awarded the Sachem Central School District home to school transportation contract commencing with the 1995/1996 school year.
>
> We were pleased to see your commitment to honor the wages, benefits, terms and conditions of employment under which our members work, together with your commitment to hire all the drivers.
>
> As you have been previously advised, . . . Local 424 is the certified . . . representative of the employees currently providing service to the Sachem School District. Though there is considerable time between now and the beginning of the 1995/1996 school year, we think it is important that you have the opportunity to meet with the drivers so that you may have appropriate forms and personnel data filled out by your new drivers. Additionally, it will be necessary for both Montauk . . . and . . . Local 424 to sign off on a successor agreement covering this unit of employees.

This letter was followed up by another letter dated March 27, wherein Boyle stated that he had not heard from Mensch.

On March 28, 1995, Mensch Sr. responded to Boyle as follows:

> The contract that has been awarded to the transportation services . . . does not go into effect until July 1, 1995. Therefore, it would be inappropriate to meet with you or any of the employees of Laidlaw Transit Inc., as we wish not to create an atmosphere to be accused of interfering with the present operation. I would be more than happy to meet with you after July 1, 1995, to discuss whatever matter you wish to bring forward.

On March 29, 1995, Boyle sent a letter to the School District, with a copy to Montauk. This read, in pertinent part:

> As you know, Montauk . . . was awarded the home to school transportation contract. . . . As you are further aware, John Mensch, . . . prior to his company being awarded the contract has submitted a letter to the school board which made certain guarantees with respect to the continuation of service by the current drivers together with the assumption of the wages, benefits, and terms and conditions of employment under which they work.
>
> [I] have attempted to contact the principles of Montauk . . . in an effort to meet with them to effectuate the above. . . . [I]t appears that the company has no intention of honoring the terms and conditions of employment of the drivers, and moreover claims it never guaranteed that if hired, the current drivers would work in the Sachem School District.
>
> [W]e therefore are requesting that you forthwith vacate the award of home to school transportation to Montauk Bus. To do otherwise would be irresponsible. If you can not trust a company to live up to basic obligations what can you expect in the way of service and safety obligations?
>
> . . . .
>
> We are therefore serving notice that should there be no formal agreement in place between Montauk . . . and Local 424 by Monday, April 17, 1995, we will take appropriate preemptive action to indicate the seriousness of Montauk Bus Company's actions to the district and the community at large. This includes but is not limited to the withdrawal of the services our members provide.
>
> [I]t is our sincere hope that the district will intervene by either vacating its award, or by compelling Montauk Bus officials to enter into agreement with us on behalf of the drivers.

On April 4, 1995, Laidlaw, at the request of the Union, sent a letter to Montauk indicating that it had no problem with Montauk meeting with the drivers and in negotiating with the Union.

Also on April 4, 1995, Boyle told the drivers to apply for jobs at Montauk and told them to them to take jobs even if they were told that they might be assigned to work outside the district.

On May 2, 1995, Boyle sent a letter to the School District complaining about the fact that Montauk had not yet met with any of the former Laidlaw drivers. This letter read in pertinent part;

> To date not a single driver has been hired by Montauk bus.
>
> Drivers who have gone through the application process . . . have been told that if hired they may work out of other Montauk bus locations serving other districts. When asked by every driver who has applied, what is the pay and benefit I will receive? The company has informed each driver ''that no determination has been made.''
>
> In short, though the district awarded Montauk Bus the contract in part as a result of their guarantee . . . that it would hire all the bus drivers to service the district and would maintain wages and benefits, not a single action has been taken to comply with same.

. . . .

We once again call upon the district to seek enforcement of the guarantee made to it. To do otherwise would be a breach of the board's commitment to the community to enforce its vendor contacts and commitments related thereto.

While awarding a contract to a company who bid 1.6 million dollars above the lowest 4 year bidder only to lower it 1.7 million after the final bid process, should have raised enough eyebrows to question the validity both ethically and legally of same, it apparently didn't. To now allow that same awarded company to snub its nose at the school board by not complying with a specific guarantee to the district, we believe calls into question the commitment of district officials to insure the safe, reliable transportation. . . .

So as to insure same, we ask that you take the following immediate steps:

1. Advise Montauk Bus to acknowledge its commitment by:

a) Call a meeting of all drivers.

b) Sending . . . a guarantee of employment letter containing the wages and benefits guarantee it made to the school board, specifically stating what the wages and benefits will be to each driver currently serving the district.

c) Complete the above by no later than May 10, 1995.

. . . .

We and each of the drivers want a smooth transition of companies providing service to our community. We are all prepared to facilitate same.

If however, our member's jobs, wages and benefits are jeopardized in any way, we are also prepared to do whatever is necessary to ensure the livelihood of the drivers and their families.

Let it be clear that those who seek to take food off the table of our members and their families, will have the food, table and chairs taken from theirs.

On May 9, 1995, the Respondent sent to a letter to former Laidlaw's employees which read:

[T]he transportation contract between the Sachem School District and the Montauk Bus Company is not in effect until July 1, 1995. Therefore it has been my position, due to the nature of the competition between Laidlaw Transit, Inc., and Montauk . . . that I would not interfere with the present driver operations until the 1994–95 school year is complete.

The Montauk Bus Company, Inc., has made a professional commitment to the Sachem School District to utilize brand new equipment and to hire all of the available, qualified Laidlaw drivers (the word qualified is *meant* to be, all personnel who meet rules, regulations and drug testing standards that are required under NYS 19A and 156.3 Commissioner of Education Regulations). There *will not* be a reduction in the hourly wage for all current Laidlaw drivers for the upcoming 1995–96 school year and it is my intention to honor that commitment.

In the next several weeks my staff and I will be contacting you personally regarding our next pre-employment qualification segment. Hopefully, at the time, Montauk . . . will be in our new facility located within the Sachem School District. I have also enclosed for your review, my recent letter to Mr. Bruce Singer. . . . This letter is self explanatory. I believe it is the best interest of everyone that Laidlaw . . . your present employer, and your Union representatives explain their positions as to their plans in servicing the remaining part of the 1995–96 transportation contract with the Sachem School District.

On June 8, 1995, Boyle sent another letter to the School District, which in pertinent part read:

[T]o date, Mr. Mensch has refused to meet with the drivers concerning their positions in the 95/96 school year. Mr. Mensch has continually stated to us, the drivers and the district, that his reason for not meeting with them is so as not to infringe on Laidlaw's contract. . . .

Yesterday's Port Jefferson meeting greatly concerns the Sachem drivers as well as myself in that to date, no effort has been made by the district to insure that Montauk . . . has the drivers, as well as the financing in place for the purchase of the new buses he promised to the Sachem district and the community.

Information passed along to us suggests that he has yet to have financing for the promised buses.

. . . .

Remember, it is now June 8, 1995. With apparently no bus order financed, no yard and no formal contract with the drivers, not to mention the time delays in registering and DOT inspecting buses, time is of the essence.

By this letter, I am merely suggesting that as district officials with the responsibility of insuring the professional, safe and reliable transportation of the district's children, you can no longer sit idly by, turning a deaf ear to what is potentially a major problem brewing.

Each and every driver wants Montauk. . . . to succeed in Sachem. But as professionals who reside in the district and whom have served it well, they deserve better than being put on the back burner. The district as well deserves better.

Again, I am requesting, on behalf of each driver who serves the district, that you demand that Montauk Bus meet with the drivers as they did with Port Jefferson. Additionally I suggest you get a financing commitment for both the chaises and bodies of the 88 new buses . . . as well as some assurance as to where the buses will be dispatched from. . . .

Prior to obtaining the Sachem contract, Montauk had its main yard and facility at Calverton, Long Island, which is about 18 miles away from Bohemia and is well outside the Sachem School District. It also had terminals in Bellport which is closer to the Sachem School District and in Hampton Bays which is about 26 miles from Bohemia.

C. *Montauk Wins the Bid*

Having won the contract, Montauk attempted to obtain the property and terminal that Laidlaw had utilized at Bohemia. However, this property was not made available to Montauk. As a consequence, Montauk leased a 3-acre site in Holbrook, which is about 4 miles away from Bohemia and which is on the border of the Sachem School District. According to John Mensch Sr., the Holbrook terminal was thereafter used to service the Sachem School District and all of the drivers at that location did Sachem school routes. He also testified that the Company also utilized one of its preexisting yards at Bellport to service some of the Sachem routes; this yard being about 8 miles away from Holbrook. In this regard, he testified that about half of the drivers assigned to the Bellport yard did Sachem school bus routes and that the others did routes for other school districts.

According to Mensch, the Holbrook yard had about 50 buses and the Bellport yard had 29 buses. He testified that for the start of the 1995–1996 school year, the Holbrook terminal employed about 60 drivers and the Bellport yard had about 30 drivers. Based on the evidence it appears to me that virtually all of the drivers who reported to work at the Holbrook terminal were assigned to work on the Sachem School District contract. The evidence also indicates that about half of the drivers who reported to the Bellport terminal were assigned to do Sachem School District runs and that the others were assigned to other routes.

Thus, at the start of the 1995–1996 school year, the Bohemia terminal was no longer being used and the historical bargaining unit had been relocated to 1-1/2 locations. However, in January 1996, the owner of the property at Bellport refused to release it to Montauk and therefore that terminal was closed. When that happened, about 15 drivers at Bellport who were assigned to do Sachem runs were relocated to Holbrook and the remainder were reassigned to Calverton. Thus, by January 1996, the Sachem School District routes were once again concentrated into a single terminal location where all or most of the drivers were assigned to do Sachem routes. For the following year (September 1996–June 1997), another 21 drivers were added to this terminal because Montauk gained the field trip portion of the Sachem School District work.

At some point in July or August 1995, Montauk hired drivers to perform the Sachem routes. The evidence indicates that of the drivers hired, 45 were formerly employed by Laidlaw and the remainder were, for the most part, other employees of the Company who had worked doing routes for the Eastport School District and who would otherwise have been laid off because Laidlaw took that contract away from Montauk. The parties entered into the following stipulation:

> Prior to September 9, 1995, Montauk Bus Co., Inc. employed as a majority of employees to drive school buses in the Sachem School District, individuals who were previously employed by Laidlaw Transit, Inc. and who drove buses for Laidlaw in the Sachem School District.[2]

On August 1, 1995, the Union sent a letter to the Company with a copy to the School District complaining that Montauk was not offering jobs to all of the former Laidlaw drivers.

On August 29, 1995, the Union sent a letter to the School District claiming that it was investigating ''influence peddling'' in connection with Montauk's bid process and its attempt to extend the contract. Among other things, Boyle requested the School District to notify two finance companies that Montauk had only a 1-year contract.

On August 30, 1995, Boyle wrote to Mensch Sr. as follows:

> Please be advised that . . . Local 424 is the certified exclusive bargaining representative of all school bus drivers performing services in the Sachem School District. As the bargaining representative . . . . Local 424 hereby requests that you contact the undersigned forthwith to commence negotiations for a collective bargaining agreement covering such employees.

On August 31, 1995, Mensch Sr. responded by stating:

> We are in receipt of your letter dated August 30. . . . Please be advised that unless and until our employees, . . . select your union as their bargaining representative in a unit appropriate for collective bargaining purposes through a secret ballot election, Montauk . . . will not recognize your union.

Boyle testified that towards the end of August, he had a telephone conversation with Alan Breslow, one of the Company's attorney who said that the Company wanted to have an election where all 200 plus of the Company's drivers would vote. Boyle states that he responded that he was not interested in representing the Company's other employees.

On September 5, 1995, the Company's attorney, Neil Frank, wrote to Boyle in response to the Union's August 30 letter and suggested a meeting to discuss a secret-ballot election.

Also, on September 5, 1995, Mensch Sr. wrote to Boyle and complained about Boyle's attempt to get the superintendent of the Sachem School District to cancel his contract or not to extend it. Mensch asserted his opinion that the Union was the servant of, or controlled by Laidlaw.

In the meantime, on August 31 and September 1 and 5, the drivers performed practice runs for the Sachem School District in order to test the routes. One of the functions of these runs was to prepare what are called ''left/right sheets'' which are, as far as I understand, a series of instructions or

[2] According to Mensch Sr., in order to do the Sachem School District home to school contract, the Company had to employ a total of 79 drivers, of whom 7 or 8 were reserve drivers who would not be assigned to any specific route but would be available to fill in as needed. He testified that the company offered employment to about 51 former Laidlaw drivers who accepted the jobs. However, he testified and the record tends to confirm, that prior to the first day of school, only 45 former Laidlaw employees actually showed up for work and became employees. The record also shows that there were 14 former Laidlaw drivers who were designated standby drivers which meant that they were, in essence, put on a preferential hiring list and would have been hired in the event of turnover or if the Company obtained more routes. The record shows that the Union filed a charge alleging that 23 of the former Laidlaw drivers had unlawfully been refused employment by Montauk and that the charge was dismissed.

directions for each route. These are kept on the buses so that the driver of the bus is certain of how to run the route.

D. *The Strike*

On September 5, 1995, Boyle conducted a meeting of the former Laidlaw drivers and a vote was taken to authorize a strike against Montauk. The schools were to open on September 6.

Notwithstanding the strike vote, all drivers worked from Wednesday, September 6, through Friday, September 9. The Company offered evidence to show that during this period of time, the ''left/right sheets'' were confiscated from the buses. The Respondent argues that anticipating that the Company would hire replacements when the strike began, the former Laidlaw drivers took these sheets to prevent any replacements from efficiently doing their jobs. In short, the Company contends that the people who ultimately became strikers engaged in a form of sabotage. (Assuming that some unnamed drivers confiscated the left/right sheets, this would be, in my opinion, a relatively minor form of interference.)

On Monday, September 11, 1995, 43 of the 45 former Laidlaw drivers who had been hired by Montauk, commenced a strike. These strikers picketed outside the Holbrook and Bellport terminals and at various schools within the Sachem district when the buses were present. The other drivers employed at these terminals did not strike and two of the former Laidlaw drivers also did not engage in the strike.

Bruce Singer of the Sachem School District testified that on September 11, he was told by Boyle that there would be a strike unless all of the former Laidlaw drivers were hired by Montauk at their preexisting terms and conditions of employment. He testified that Boyle asked him to get rid of Montauk and that Laidlaw would do a better job. On that same day, Boyle sent Singer a letter asserting among other things that (1) drivers were required to drive buses that unlawfully had license plates that were switched from other buses; (2) that registration stickers on buses did not match the plates; (3) defects such as inoperable turning signals have not been corrected; and (4) that Montauk was fueling the buses from a mobile truck, creating a seepage hazard. The letter goes on to state:

> Let it be clear, the drivers are engaged in a protected unfair labor practice strike. If the district wish is to explain away the abysmal service and total disregard for safety that the above suggests then so be it. We however, will not go down that unconscionable path but instead, will continue our necessary action until Montauk Bus complies with the law and provides safe school buses for our members and the district's children.

The Company contends that during the period of the strike (and thereafter), the Union and the strikers engaged in a course of conduct which by its nature disqualified the Union from representing any employees of the Company and disqualified the strikers from reinstatement. (This being in addition to taking the left/right sheets.)

There was a charge filed by the Employer in Case 29–CB–9667 in which a complaint was issued on February 13, 1996. That complaint alleged that the Union violated Section 8(b)(1)(A) by (1) blocking entrances during picket line activity on September 11, 1995, and (2) by videotaping nonstriking employees on September 12, 1995. That case was subsequently settled.

The Respondent points to a leaflet distributed by the Union on or about September 11, 1995. Among other things, this leaflet stated:

> Since Wednesday . . . many of you have experienced the worst transportation fiasco in Sachem and Suffolk County history.
>
> The servicing problems are the result of the district's decision to award the 1995/96 transportation contract to a small company with limited resources and no experience transporting in a district even close to the size of our community.
>
> Many of the drivers who have transported Sachem children . . . were replaced by inexperienced drivers who, in many cases, have just received their school bus drivers' licenses and mandated training. The experienced drivers were unlawfully discharged by the new contractor in violation of federal law.
>
> On Monday, the . . . drivers . . . [engaged] in a lawful unfair labor practice strike. The drivers were required to drive unregistered buses, and complaints of buses with inoperable equipment went unattended. We could not allow ourselves to cause harm to ourselves, our community and your children. *We had no choice*.
>
> You should know, Montauk Bus was awarded the Sachem contract despite repeated . . . statements from drivers and our representatives that the servicing problems, safety concerns and inexperienced drivers would be prevalent If the district awarded them the contract. . . .
>
> *What has this $1.00 brought you and your child?*
>
> Bus' that in some cases are unregistered;
>
> Bus' that have not met the requirements of federal DOT regulations for registration;
>
> Inexperienced drivers who have been witnessed engaging in unlawful actions;
>
> Drivers from the company's other districts . . . who find it necessary to race from one end of Long Island to the other. . . .
>
> A company that had, as of this Thursday, failed to equip each bus with an operable radio per the requirements of the district;
>
> A company that, of Thursday, has not provided the district with a list of drivers and has further failed to provide *police records, finger prints, drug testing results and motor vehicle driving abstracts* of each driver transporting your child to the district.
>
> . . . .
>
> We are on strike and will remain on strike until safe buses are provided and all drivers guaranteed home-to-school work by the district are employed by whatever company many be chosen by the district.

The pamphlet also referred people to a telephone hotline set up by the Union where a recorded message stated, inter alia:

> The Sachem School District, which continues to report that there are no problems with the transpiration

provided by Montauk Bus, the district's new contractor, have been less than candid with you.

Did you know that the district, as of today, has not yet received information about the drivers transporting your children. That's right—no record of prior criminal activities, no driving abstracts, no names, no drug tests results—no nothing.

Ask district officials why are they allowing the new contractor to get away with this. We ask that you join with your fellow residents at the Tuesday, September 19 Board meeting at Sachem North.

It is time that the district gave the transportation contract to a reasonable, responsible safe transportation company.

In addition, to the above, the evidence shows that on or about September 15, 1995, the Union made specific allegations to the School District that various of the buses were not in compliance with state law in terms of safety and registration rules. In this regard, Singer testified that his security force went out to check the buses to see if the Union's allegations were true and determined that they were baseless.

E. *The Offer to Return to Work and the Employer's Failure to Reinstate the Strikers*

On September 18, 1995, the Union faxed a letter with a list of drivers to the Company. A copy was also sent to the School District. This read:

> This shall serve to advise you that the school bus driver members of . . . . Local 424 currently engaged in unfair labor practice strike, hereby make an unconditional offer to return to work immediately.

As the Company, by its attorney responded to the above by a letter dated September 19, it is more probable than not that the Union's letter was received by the Company on the date of transmission; September 18.[3]

It was stipulated that since on or about September 18, 1995, the Company has hired new employees and transferred employees from school districts other than the Sachem School District, to perform work previously assigned to and performed by Montauk's striking employees, in the Sachem School District. Moreover, while the Company sent what purported to be a reinstatement offer to the strikers on September 20, 1995, the testimony of both John Mensch Sr. and John Mensch Jr. shows that the Company, after a meeting with Boyle, changed its mind and has decided to not recall any of the strikers. Thus, it is plain to me that the Company negated the September 20 reinstatement offer and has never carried it out.

Inasmuch as the strikers were not recalled, the picketing continued until about the beginning of October 1996. One of the consequences of the strike was that the Sachem School District, pursuant to its contract with Montauk, penalized the Company $150,000 for nonperformance caused by the strike.

John Mensch Jr. testified that when the strike began, the Company used managerial people and people from other terminals to do the Sachem routes. He also testified that after consulting with his attorneys, the Company decided to hire permanent replacements. In this regard, he states that the Company began advertising in local newspapers on or about Tuesday, September 12, and began interviewing and ''hiring'' people later in the week. Mensch Jr. testified that some of the people (he doesn't recall who), asked what would happen to them when the strike was over and he told them that they would have permanent jobs and not be replaced. He also told them that they could not go to work until their papers and licenses were checked out and approved in accordance with state law.

The evidence shows that none of the people who were interviewed during the week ending September 15, 1995, began work until Tuesday, September 19, which is 1 day after the Union faxed the offer to return to work. According to John Mensch Jr., about 8 to 10 people began work on September 19, about 10 to 15 started work on September 20 and that more began work on Thursday and Friday of that week. He testified that additional people started during the following week and that no more people were hired after the third week of the strike.

Apart from his testimony that some unidentified persons were told that they were permanent replacements and that they would not be replaced after the strike ended, the company could provide no other specific information to support its contention that these people were hired with the understanding that they were permanent replacements. None of the people hired were called as witnesses and no personnel or other records were presented to support this claim.

Quite apart from the employment situation as of September 18, 1995, and immediately thereafter, the evidence shows that the Company has hired new drivers including a group of about 21 new people to cover the Sachem field trips that it acquired for the 1996–1997 school year. None of the striking drivers were offered these jobs.

III. ANALYSIS

A. *The Successorship Issue*

The Supreme Court defined ''successorship'' in *Fall River Dyeing Corp. v. NLRB*, 482 U.S. 27 (1987). In that case, the Court held that an employer which takes over the operations of another is required to recognize and bargain with a union representing the predecessor's employees when (1) there is a ''substantial continuity'' of operations after the takeover, and (2) if a majority of the new employer's work force, in an appropriate unit, consists of the predecessor's employees at a time when the successor has reached a ''substantial and representative complement.'' The Court summarized a number of factors relevant to determining continuity as follows:

> [W]hether the business of both employers is essentially the same; whether the employees of the new company are doing the same jobs in the same working conditions under the same supervisors; and whether the new entity has the same production process, produces the same products and has basically the same body of customers.

While there are some differences in the way Montauk operates and also differences in the wages and terms and conditions of employment between the two companies, it is self-

[3] The letter from Neil Frank to Boyle, dated September 19, states, inter alia; ''I am writing on behalf of Montauk . . . in response to your letter . . . which purports to constitute an unconditional offer.''

evident that both are involved in the same employing industry and that the employees essentially do the same work. They drive schoolbuses.

In the present case, the unit in question (the drivers at the Bohemia Yard), had existed for many years. And when the employees were employed by Laidlaw (the immediate predecessor), they were covered by a separate collective-bargaining agreement wherein they were considered by Laidlaw and the Union as a separate bargaining unit. Laidlaw's other terminals in Long Island were covered by other and separate labor contracts.

When Montauk obtained the bid from the Sachem School District, Montauk obtained about 90 percent of the work previously done by Laidlaw's employees who were physically located in the Bohemia terminal.[4] If it was clear that Montauk intended to operate this terminal at this particular location with a work force of busdrivers from which a majority were prior Laidlaw employees, there would be a strong presumption that this single terminal would be an appropriate unit[5] and that Montauk would be a successor under *Fall River Dyeing*, supra. If the terminal had been relocated during the life of the contract between Laidlaw and the School District, the bargaining unit and the contract would simply follow the relocation. *Rock Bottom Stores*, 312 NLRB 400 (1993). By the same token, it would seem to me that if the succeeding company takes over the operations of the terminal, continues to operate in a similar fashion with a complement consisting of a majority of the predecessor's employees, then a mere relocation of the facility (either before or after the takeover), would not undermine the sucessorship obligation because there would continue to be a presumption that the Union continues to represent a majority of the work force in the relocated unit.

The present case has the complication that the Bohemia terminal, not being made available to Montauk, was not used by Montauk which, at least initially, split up the Sachem School District routes into a terminal located in Holbrook and half of a terminal located in Bellport. But this situation changed within about 4 to 5 months and the Sachem School District routes were consolidated into the Holbrook terminal in or about January 1996. Thus, by that date, the Sachem routes were essentially carried out by drivers who reported each day to the Holbrook terminal and who were directly supervised by that terminal's dispatcher.[6]

The Respondent contends that the predecessor's terminal cannot exist as a separate appropriate unit. It argues that because of the Company's centralized control over the business and its labor relations, the only appropriate unit should consist of all of its terminals and all of its employees in Long Island. It argues that even if a majority of the work force utilized for the Sachem School District routes consisted of a majority of the former Laidlaw employees, they would comprise a minority of Montauk's total complement of drivers in the only appropriate unit which would be a multilocation unit. I do not agree.

At the beginning of the 1995–1996 school year, Montauk had four terminals, which were geographically separated and which serviced routes in proximity to the respective terminals. In January 1996, the Bellport terminal closed and this left three terminals, with the employees at the Holbrook terminal doing schoolbus routes under the Sachem School District contract.

Each terminal has its own dispatcher who is responsible for the day-to-day operations of the terminal and who is principally in charge of scheduling and rescheduling the runs. When drivers are unavailable, the dispatcher assigns reserve drivers to do the routes and rearranges assignments as needed. In this respect, the record, in my opinion shows that there is substantial authority of local management. See *Equitable Life Assurance Society*, 192 NLRB 544 (1971).

The record shows there is some interchange between the terminals with respect to buses and other equipment and also among the Company's mechanics. There is, however, very little interchange of busdrivers from one terminal to another. (From time to time, when a terminal, due to illness or other circumstances runs out of its own reserve drivers, it may use reserve drivers stationed at another terminal.)[7] That is, although the Company advises its drivers that it has the right to assign them wherever it wants, the fact is that most drivers stick to the terminals and routes to which they are assigned and this is not unreasonable because routes are more efficiently run by drivers who are familiar with their routes. In my opinion, this lack of substantial interchange of employees between the terminals is a factor favoring a single location unit. *Rohm & Haas Co*., 183 NLRB 147 (1970).

The terminals are geographically separate and the Holbrook terminal, which is the unit involved here, is more than 20 miles away from the Company's Hampton Bays and Calverton terminals. This too is a factor favoring a single location unit. *Capital Bakers*, 168 NLRB 904, 905 (1968).

It may be (but highly unlikely), that in an initial unit determination, and absent any bargaining history, the Board might conclude that a multilocation unit would be appropriate. But for our purposes, the Board has also made it clear that it need not determine ''the only appropriate unit, or the ultimate unit, or the most appropriate unit: the Act requires only that the unit be appropriate.'' *School Bus Services*, supra. Moreover, in *Trident Seafoods, Inc. v. NLRB*, 101 F.3d 111, 114 (D.C. Cir. 1996), the court held that in a sucessorship case, ''there is a strong presumption favoring the maintenance of historically recognized bargaining units.'' The court went on to state that the Board ''is reluctant to disturb units established by collective bargaining so long as those units are not repugnant to Board policy or so constituted as to hamper employees in fully exercising rights guaranteed by the Act.''

In my opinion, the Bohemia collective-bargaining unit which was the historical bargaining unit governing the rela-

[4] Where an employer takes over only a portion of a predecessor's operation it may still be considered a successor depending on the totality of circumstances. See *Hydrolines, Inc*., 305 NLRB 416 (1991); *School Bus Services*, 312 NLRB 1 fn. 1 (1993).

[5] Generally, a single plant unit is presumptively appropriate, *Kendall Co*., 184 NLRB 847 (1970); *Passavant Health Center*, 313 NLRB 1216 (1994); and *Executive Resources Associates*, 301 NLRB 400 (1991).

[6] Of the original 45 former Laidlaw employees hired, 43 went on strike. Although it is not entirely clear, it is probable that these people were assigned to the Holbrook and not the Bellport terminal.

[7] Each school district contract, including the Sachem contract, generally requires the Company to have a group of reserve drivers comprising 10 peercent of the regular route drivers assigned to the contract.

tionship between the Union and the predecessor companies, was a single location unit which continued to exist after Laidlaw won the bid and after the location was moved, first to Holbrook and a portion of Bellport, and thereafter into a single location at Holbrook. When Laidlaw commenced operations on the Sachem School District contract, it did so with a group of employees, a majority of whom had been formerly employed by Laidlaw. Given the presumption that the Union's majority status continued after the takeover, I conclude that Montauk was a ''successor'' to Laidlaw in a unit which eventually comprised the bus drivers who were stationed at Holbrook, New York. Unlike the allegation of the complaint which defines the unit by the Sachem School District contract, I find that the unit should be defined by its location. After all, assuming that the Company obtained other contracts which are serviced by busdrivers stationed at Holbrook, it would make no sense to have a portion of the drivers at such location represented by the Union and a portion who would be without representation. Moreover, what would happen if the Company lost all or part of the Sachem School District contract and managed to replace it with another contract where the routes were covered by Holbrook's drivers?

B. *The Alleged Conflict of Interest Defense*

The Company asserts that the Union's sole interest was in ousting Montauk from the Sachem School District contract and implies that the Union, either as the agent of or in conspiracy with Laidlaw, engaged in conduct designed to have Laidlaw restored as the school bus provider. In support of its contention, the Respondent relies on *Bausch & Lomb Optical Co*., 108 NLRB 1555 (1954); *Harlem River Consumers Cooperative*, 191 NLRB 314, 319 (1971); and *Pony Express Courier Corp*., 297 NLRB 171 (1989). I do not agree with the Respondent's factual or legal conclusions in this regard.

I do not question and I would conclude that the Union initially was, in fact, trying to get the Sachem School District to retain Laidlaw and that at a later time it sought to annul Montauk's contract. But this hardly represents the type of conflict of interest outlawed by the Act. It also does not demonstrate, and there is no independent evidence to demonstrate that the Union was acting either as an agent of or in conspiracy with Laidlaw.

The Union had an existing collective-bargaining agreement with Laidlaw which employed the Union's members at fairly good rates of pay and benefits. If Laidlaw lost the contract to Montauk, the Union not only faced the prospect that some of the employees would lose their jobs, but that their existing wages and benefits would have to be renegotiated. There was, therefore, a legitimate and separate union interest in having the School District retain Laidlaw as the contractor, or failing that, in trying to ensure that any succeeding contractor would hire all of the employees and assume the terms of the collective-bargaining agreement. Both of these things, the Union tried to accomplish before the contract was let out to bid.

Once the contract was won by Montauk, the Union attempted to contact that company to insure that it would hire the former employees and retain their existing wages and benefits. When the Union met with what can only be described as a stall, it tried to enlist the School Board to convince Montauk to live up to a promise to hire all of the Laidlaw employees. These actions also represented a legitimate interest that the Union had in attempting to save jobs and to have those people hired by Montauk not suffer a loss of wages or benefits.

During the summer of 1995, it became clear that Montauk was hiring some but not all of the former employees. It also became obvious by letters dated July 28 and August 30, that the Company was not going to recognize and bargain with the Union until and unless there was an election.

As it was obvious by August 31, 1995, that the Company was not going to hire all of the former employees; that it was not going to retain their wage rates and benefits; and that it was not going to recognize the Union as the collective-bargaining representative, the Union decided, with the approval of the drivers, to engage in a strike. This is alleged in the complaint as an economic strike[8] and it is clear to me that the Union, by its strike which ensued thereafter, was seeking a proper goal consistent with its own and the employees' self-interest. (As opposed to Laidlaw's interests.) That the Union sought, during the course of the strike, to convince the School Board to cancel Montauk's contract, does not make the Union's strike illegitimate. What is outlawed is only union actions which are intended to induce individuals employed by secondary persons to engage in strikes or refusals to perform their services or actions which threaten, restrain, or coerce secondary persons with an object of causing them to cease doing business with the primary employer. (See Sec. 8(b)(4)(i) and (ii)(B) of the Act which prohibits secondary boycotts.) The point is that it is perfectly permissible under the law, for a union which is engaged in a primary strike, to try to convince, by noncoercive means, the Company's customers and/or its suppliers to cease doing business with the primary employer in an effort to put pressure on it to accede to the Union's demands.

The cases cited by the Respondent all involve factual situations which are completely different from the present case.

In *Pony Express Courier Corp*., supra, the union's founder and business agent was also the president of a consulting company which was a direct competitor of the respondent. In such circumstances, the Board refused to find that the respondent had violated Section 8(a)(5) of the Act because of Zimmer's ''conflict of interest'' that jeopardized the bargaining process.

In *Harlem River Consumers Cooperative*, 191 NLRB 314, 319 (1971), the union agent was in a similar situation as that in *Pony Express*, supra, and the Board stated:

> [I]t is improper for a union agent to have financial interests which requires him to deal with the Employer in a capacity other than as union agent. The employees he represents are entitled to his undivided loyalty and the employer is entitled to know that in his dealings with the representative of his employees the relationship will be governed by the legitimate concerns of collective bargaining and not special concerns unrelated thereto.

[8] Inasmuch as I have concluded that the Respondent was a successor having an obligation to bargain with the Union, one wonders why the complaint does not allege that the strike which commenced on September 11, was not an unfair labor practice strike. However, as the complaint labels the strike as an economic strike, I am not going to find here that it was an unfair labor practice strike.

In *Bausch & Long Optical Co*., 108 NLRB 1555 (1954), the court agreed with the Board that a union was not entitled to be the employees' representative where it had established a business enterprise in the same locality and industry and therefore was a direct competitor with the Respondent. The court stated:

> We believe that the Union by becoming the Respondent's business rival has created a situation which would drastically change the climate at the bargaining table from one where there would be reasoned discussion in a background of balanced bargaining relations upon which good faith bargaining must rest to one in which, at best, intensified distrust of the Union's motives would be engendered. The Board has held that under unusual circumstances, a union may, by contemporaneous action in connection with bargaining, afford an employer grounds for refusing to bargain so long as that conduct continues. . . . In our opinion, the Union involved herein by virtue of its dual capacity has made fair dealing with the Respondent inherently impossible. [Citations omitted.]

The Respondent also argues, relying on *Sahara Datsun*, 278 NLRB 1044 (1986), that Boyle's ''personal attacks'' on the Company should disqualify him from acting as the bargaining representative. In substance, the Respondent argues that even if it should be required to bargain with the Union, it should not be required to deal with Boyle who should be replaced as the Union's representative. Among other things, the Respondent cites a portion of a letter where Boyle said, ''[T]he Sachem School District doesn't need the likes of Montauk Bus and the belligerent, self-serving arrogance of the Mensch family.'' The Respondent also refers to statements by Boyle accusing the company of ''unethical influence peddling'' in obtaining the contract and ''engaging in fraud against various finance companies.'' This last apparently consisted of some undetermined communications by Boyle to one or more finance companies.

Whether these opinions by Boyle were well or ill founded, the law permits a substantial amount of heated rhetoric by either side in a labor dispute. *Linn v. United Plant Guard Workers Local 113*, 383 U.S. 53 (1961) (libel suit dismissed against Union in the absence of malicious intent in making false statements). See also *Sierra Publishing Co. v. NLRB*, 889 F.2d 210 (9th Cir. 1989).

Legally, the people involved in a collective-bargaining relationship are required to toughen their skins and to deal with the representatives designated by the other side except in such extraordinary circumstances which would justify the conclusion that good-faith bargaining would not likely be possible. And in the present case, I don't believe that Boyle's conduct or statements rise to the level described in *Sahara Datsun*, supra.[9]

[9] In *Sahara Datsun*, supra, the individual in question made unsubstantiated statements to a bank loan manager that the company's officials were falsifying information contained in loan applications from customers. In addition, he accused certain of the owners of being involved in prostitution and drug trafficking. The Board stated, inter alia: ''As we have stated there is some times a fine line between raising highly sensitive issues that relate to terms and conditions of employment and disparaging an employer's reputation. In this case, however, we conclude that Darata crossed that line''

C. *The Refusal to Reinstate Strikers*

Assuming that the strike was an economic strike, and putting aside for the moment, the Respondent's contention that it was an unprotected strike, if the strikers or the Union on their behalf made an unconditional offer to return to work, the Employer would have an obligation to immediately reinstate the strikers, except to the extent that it hired permanent replacements. *NLRB v. Mackay Radio & Telegraph Co*., 304 F.2d 333, 345–346 (1938); *NLRB v. Fleetwood Trailer Co*., 389 U.S. 375 (1967); *NLRB v. Augusta Bakery Corp*., 957 F.2d 1467 (7th Cir. 1992); and *Laidlaw Corp*., 171 NLRB 1366 (1968), enfd. 414 F.2d 99 (7th Cir. 1969). As stated by the Board in *Laidlaw*, supra.

> [E]conomic strikers who unconditionally apply for reinstatement at a time when there positions are filled by permanent replacements: (1) remain employees; and (2) are entitled to full reinstatement upon the departure of replacements unless they have in the meantime acquired regular and substantially equivalent employment, or the employer can sustain his burden of proof that the failure to offer full reinstatement was for legitimate and substantial business reasons.

The Employer contends that it hired permanent replacements before the Union made its offer to return to work.

John Mensch Jr. testified that immediately after the strike began, the Company put advertisements in local papers and started to interview and hire people on Thursday, September 14. He testified that some of the people (he does not recall who), asked what would happen to them when the strike was over and he told them that they would have permanent jobs and not be replaced. He also told them that they could not go to work until their papers and licenses were checked out and approved in accordance with state law. None of these people began to work for the Company until September 19, which is 1 day after the Union faxed its offer to return to work. It appears that additional people were interviewed and offered jobs at various times thereafter.

Assuming that Mensch Jr. did in fact offer, before September 18, permanent jobs to applicants which were accepted and which were conditioned only on their licenses and papers being approved, those hirings would be valid for purposes of this case. Thus, in *Solar Turbine*, 302 NLRB 14 (1991), the Board in a 2 to 1 decision held that the hiring of permanent replacements took place when they accepted the jobs even though the jobs were contingent on the applicants passing drug and alcohol tests. Therefore, in the present case, if some permanent replacements were hired before the Company received the Union's offer to return, there would be an equal number of strikers who would not be entitled to immediate reinstatement. Of course, to the extent that ''permanent replacements'' were hired after September 18, an equal number of strikers would be entitled to reinstatement and backpay. For example, if 10 permanent replacements were hired before September 18 and 33 hired after that date, then 10 strikers would not have been entitled to immediate reinstatement as of September 19, but 33 would have been. Moreover, if at some future time, permanent replacements left the Company

or as in this case, the Company hired additional drivers, the remaining 10 strikers would be entitled to reinstatement and the Company's failure to reinstate them would make it liable to these people for reinstatement and backpay from the time that any of the strikers could have been reinstated but were not.

Where replacements are hired for striking employees, the Board has held that the presumption is that replacements are temporary and that the burden of proof is on the employer to show that the replacements are permanent. *Hansen Bros. Enterprises*, 279 NLRB 741 (1986); *O. E. Butterfield, Inc.*, 319 NLRB 1004 (1995).

In my opinion, the Respondent has not met its burden. The testimony of the Employer's witnesses was largely conclusory and lacked weight. Mensch Jr. testified that some of the people who applied for the replacement jobs asked about what would happen to them if the strike ended and he testified that he told some of them that the jobs were permanent. He could not tell us to whom those promises were made or at what point in the hiring process (which took place over 2 to 3 weeks), they occurred. There is nothing in writing to corroborate this testimony and the Employer did not offer the testimony of any of the replacement drivers to verify that they were offered and accepted permanent positions.

It is noted that the Union sent its offer to return to work on September 18 and the Company's attorneys responded by letter dated September 19. Although the Respondent's letter questioned whether certain people were ever actually hired, it did not assert that any of the strikers had been permanently replaced. On the contrary, the letter states that the strikers would be recalled with the understanding that their wages and benefits would be in accordance with company policy and that they could be assigned to drive at any locality. Thus, if the Company had hired permanent replacements, this was a fact apparently not known to its attorneys. Moreover, on September 20, the Company sent letters to the strikers informing them that they would be recalled. Nothing in these letters indicate that the Company was *at that time*, taking the position that any of the strikers were precluded from immediate reinstatement on account of being permanently replaced. For better or worse, it appears that the Employer decided not to take the advise of its counsel and decided not to reinstate any of the strikers notwithstanding the letters of September 19 and 20.

The Respondent argues that the strike was not protected activity and therefore the strikers were not entitled to reinstatement because (1) the Union had a conflict of interest in its attempt to get the School District to cancel the contract and (2) the Union disparaged the Company's product.

I have already discussed the Employer's conflict of interest argument and have concluded that the Union engaged in a strike to promote a legitimate interest of its own and of the strikers. There no evidence of the type of conflict of interest that the Board has found in other cases.[10]

The Company argues that the Union, essentially by letters to the School Board, by a leaflet distributed to parents and by the hotline, publicly disparaged the Company's owners and its product. It also asserts that on some occasion, Boyle contacted Universal Bonding Company in an effort to get that company to refuse to furnish a bond to Montauk, without which, it would not be able to perform the Sachem School District contract. But in the latter regard, there is no affirmative evidence of what Boyle said and as the Respondent did not produce a witness from Universal, its assertions are mere speculation.

The facts show that the Union would have preferred to have Laidlaw retain the contract with the Sachem School District no doubt because it had a collective-bargaining agreement with that company. During the course of the bidding process, the Union made its position clear and clearly tried to persuade the School District to not consider Montauk as a qualified bidder. However, this was to no avail and after the School District awarded a contract to Montauk, and after it became clear that Montauk had no intention of hiring all of the former employees or of either assuming the old collective-bargaining agreement or recognizing the Union, Boyle stepped up his campaign to persuade the School District that Montauk could not be relied upon to perform the services for which it contracted. This too was to no avail.

I have reviewed the letters sent by Boyle, the leaflet and the hot line to which parents were requested to call. Among other things, Boyle questioned the qualifications of the replacement drivers on the grounds that there had not been sufficient time to do background checks on them. He, at one point, intimated that the Company was using undue influence to get an extension of the contract and in one letter, he characterized the Mensch family as being ''belligerent'' and ''arrogant.''

When you add all this up (including the disappearance of the left/right sheets), it seems to me that the kinds of statements made by Boyle are not untypical of the kinds of rhetoric that is often used in the context of labor disputes. Moreover, I do not think that the Union's conduct (as opposed to individual striker's misconduct), could be construed as rising to a level which would make the strikers lose the protection of the Act. For one thing, it was Boyle and not the striking employees who made the statements and I do not believe that their reinstatement rights are, or should be affected by the publications of a union representative. For another, I just do not think that the statements were all that extreme as to arguably fall within the scope of unprotected conduct as defined in *NLRB v. Local 1229 Electrical Workers (Jefferson Standard Broadcasting Co.)*, 346 U.S. 464 (1953). Thus, in *Allied Aviation Service of New Jersey*, 246 NLRB 229 (1980), the Board rejected the employer's defense that the discharge of a union shop steward was warranted because that employee had sent letters asserting that the employer performed services at the airport in a hazardous and unsafe manner. The Board stated:

> In determining whether an employee's communication to a third party constitutes disparagement of the employer or its product, great care must be taken to distinguish between disparagement and the airing of what may be highly sensitive issues. There is no question Respondent here would be sensitive to its employ-

[10] In my opinion, the Respondent's reliance on *Kenai Helicopters*, 235 NLRB 931 (1978), is not controlling. In that case, two employees used the circumstances of a strike by their fellow employees to further their own personnel interests by trying to get the company's customers to shift work to a company that the two were going to join. In that circumstance, the Board held that the employer did not violate the Act when it discharged these two people.

> ees regarding safety matters with its airline customers. Yet, we have previously held that, ''absent a malicious motive, [an employee's] right to appeal to the public is not dependent on the sensitivity or Respondent to his choice of forum.''

For other cases on this same issue see *Emarco, Inc*., 284 NLRB 832 (1987) (disparaging statements about company officials made by employees who were discharged); *Blue Circle Cement Co*., 311 NLRB 623, 634–625 (1993), enfd. 41 F.3d 203, 211 (5th Cir. 1994) (statement by discharged employee which accused employer of burning hazardous waste and endangering public safety); *Sacramento Bee*, 291 NLRB 540, 545 (1988), enfd. 889 F.2d 210, 218–219 (9th Cir. 1989); and *Richboro Community Mental Health Council*, 242 NLRB 1267, 1268 (1979).

Based on the above, I conclude that the Employer violated the Act when it failed and refused to reinstate the strikers on whose behalf the Union offered to return to work on September 18, 1995.

CONCLUSIONS OF LAW

1. By refusing to recognize and bargain with United Industry Workers Local 424, a Division of United Industry Workers District Council 424 in the unit described below, the Respondent has violated Section 8(a)(1) and (5) of the Act.

2. By refusing to reinstate employees who engaged in a strike upon their unconditional offer to return to work, the Respondent has violated Section 8(a)(1) and (3) of the Act.

3. By the aforesaid conduct, the Respondent has engaged in unfair labor practices affecting commerce within the meaning of Section 2(2), (6), and (7) of the Act.

REMEDY

Having found that the Respondent has engaged in certain unfair labor practices, I find that it must be ordered to cease and desist and to take certain affirmative action designed to effectuate the policies of the Act.

As the evidence shows that the Respondent illegally refused to reinstate the strikers, it must offer them reinstatement and make them whole for any loss of earnings and other benefits, computed on a quarterly basis from the date of such refusal, less any net interim earnings, as prescribed in *F. W. Woolworth Co*., 90 NLRB 289 (1950), plus interest as computed in *New Horizons for the Retarded*, 283 NLRB 1173 (1987).

If there is any legitimate issue as to the identify of the employees who engaged in the strike, that can be left for resolution at the compliance stage of the proceeding.[11]

Further, as the evidence establishes the Respondent is a successor to the preceding contractor, it is concluded that it must recognize and bargain with the Union in the unit described below.

On these findings of fact and conclusions of law and on the entire record, I issue the following recommended[12]

ORDER

The Respondent, Montauk Bus Company, Holbrook, New York, its officers, agents, successors, and assigns, shall

1. Cease and desist from

(a) Refusing to reinstate economic strikers to existing vacancies upon their unconditional offer to return to work.

(b) Refusing to recognize and bargain with United Industry Workers Local 424, a Division of United Industry Workers District Council 424 as the collective-bargaining representative in an appropriate unit.

(c) In any like or related manner restraining or coercing employees in the exercise of the rights guaranteed to them by Section 7 of the Act.

2. Take the following affirmative action necessary to effectuate the policies of the Act.

(a) Upon application, offer to those strikers who have not yet returned, immediate and full reinstatement to their former or substantially equivalent positions, without prejudice to their seniority or other rights and privileges, dismissing if necessary all persons hired as striker replacements after September 18, 1995.

(b) Make whole any of the strikers for any loss of earnings and other benefits suffered as a result of the refusal to reinstate them to their former jobs in the manner described in the remedy section of this decision.

(c) On request, bargain with the Union as the exclusive representative of the employees in the following appropriate unit concerning terms and conditions of employment and, if an understanding is reached, embody the understanding in a signed agreement:

> All school bus drivers employed by the Employer, performing services at the Employer's Holbrook terminal or to any relocation thereof and excluding all dispatchers, mechanics, office clerical employees, guards and supervisors as defined in the Act.

(c) Preserve and, within 14 days of a request, make available to the Board or its agents for examination and copying, all payroll records, social security payment records, timecards, personnel records and reports, and all other records necessary to analyze the amount of backpay due under the terms of this Order.

(d) Within 14 days after service by the Region, post at its facility in Holbrook, New York, copies of the attached notice marked ''Appendix.''[13] Copies of the notice, on forms provided by the Regional Director for Region 29, after being signed by the Respondent's authorized representative, shall be posted by the Respondent immediately upon receipt and maintained for 60 consecutive days in conspicuous places including all places where notices to employees are customarily posted. Reasonable steps shall be taken by the Respondent to ensure that the notices are not altered, defaced, or covered by any other material. In the event that, during the pendency of these proceedings, the Respondent has gone out

[11] Payroll records for the pay date of September 15, 1995, were received into evidence as R. Exh. 27. The names of the employees who engaged in the strike are marked at the left of their names.

[12] If no exceptions are filed as provided by Sec. 102.46 of the Board's Rules and Regulations, the findings, conclusions, and recommended Order shall, as provided in Sec. 102.48 of the Rules, be adopted by the Board and all objections to them shall be deemed waived for all purposes.

[13] If this Order is enforced by a judgment of a United States court of appeals, the words in the notice reading ''Posted by Order of the National Labor Relations Board'' shall read ''Posted Pursuant to a Judgment of the United States Court of Appeals Enforcing an Order of the National Labor Relations Board.''

of business or closed the facility involved in these proceedings, the Respondent shall duplicate and mail, at its own expense, a copy of the notice to all current employees and former employees employed by the Respondent at any time since September 7, 1995.

(e) Within 21 days after service by the Region, file with the Regional Director a sworn certification of a responsible official on a form provided by the Region attesting to the steps that the Respondent has taken to comply.

APPENDIX

NOTICE TO EMPLOYEES
POSTED BY ORDER OF THE
NATIONAL LABOR RELATIONS BOARD
An Agency of the United States Government

The National Labor Relations Board has found that we violated the National Labor Relations Act and has ordered us to post and abide by this notice.

Section 7 of the Act gives employees these rights.

> To organize
> To form, join, or assist any union
> To bargain collectively through representatives of their own choice
> To act together for other mutual aid or protection
> To choose not to engage in any of these protected concerted activities.

WE WILL NOT refuse to reinstate economic strikers to existing vacancies upon their unconditional offer to return to work.

WE WILL NOT refuse to recognize and bargain with United Industry Workers Local 424, a Division of United Industry Workers District Council 424.

WE WILL NOT in any like or related manner restraining or coercing employees in the exercise of the rights guaranteed them by Section 7 of the Act.

WE WILL upon application, offer to those strikers who have not yet returned, immediate and full reinstatement to their former or substantially equivalent positions, without prejudice to their seniority or other rights and privileges, dismissing if necessary, all persons hired as striker replacements and place on a preferential hiring list those striker applicants for whom positions are not immediately available.

WE WILL make whole any of the strikers for any loss of earnings and other benefits suffered as a result of, and to the extent that we have illegally refused to reinstate them to their former jobs.

WE WILL on request, bargain with the Union as the exclusive representative of the employees in the following appropriate unit, concerning terms and conditions of employment and, if an understanding is reached, embody the understanding in a signed agreement:

> All school bus drivers employed by us, performing services at our Holbrook terminal or to any relocation thereof and excluding all dispatchers, mechanics, office clerical employees, guards and supervisors as defined in the Act.

MONTAUK BUS COMPANY